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BRIEF IN SUPPORT OF PETITION

THE OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 556-567) being Causes No. 11190-11191 of that court is not yet reported.

JURISDICTION

The jurisdiction of this court is invoked by virtue of section 240 of the Judicial Code (Title 28 U.S.C.A. sec. 347) and Rule 37(b) of the Federal Rules of Criminal Procedure.

The opinion and orders of affirmance of the circuit court were filed December 30, 1946 (R. 556, 566, 567). A petition for rehearing was denied January 30, 1947 (R. 568).

STATEMENT OF THE CASE

Some time in the early summer of 1944, petitioner Freeman, who was doing business as a licensed accountant (R. 387), conceived the idea that a restaurant and recreation center would succeed in Spokane and spoke to Harry C. Huse about it (R. 186, 187).

Thereafter the defendant Rose and Huse discussed the proposition (R. 188) which resulted in Rose and Huse entering into a partnership agreement on August 15, 1944 (R. 188, 190; Pl. Ex. 41).

This agreement also provided that petitioner should be the paid managing director of the business and devote time to the financial management of the business (R. 193, Section VIII). The agreement also provided that petitioner was to act as the paid accountant for the firm, and that checks could be signed by petitioner (R. 194; Sec. X and XI).

On the same date an agreement between petitioner and Huse was entered into (R. 200; Pl. Ex. 42) which provides that in consideration of petitioner advancing Huse $10,000 in connection with the restaurant, Huse agreed to repay this money, and to first devote all the profits of his share of the partnership to such repayment. Upon this sum being fully repaid petitioner then was to receive a one-third share of Huse's half interest in the Recreation Center. This sum was never repaid to petitioner (R. 208, 218).

As managing director of the business petitioner negotiated for the lease for the premises signed by Huse and Rose (R. 60-78; Pl. Ex. 1), took care of the contracts for the building construction, took care of the books of the concern, and through an assistant in his office (R. 386, 422-423) signed checks for disbursements for the enterprise, and devoted such little time as he could to the operation of Huse's Restaurant (R. 394, 396). Petitioner, as managing director, had the authority to determine policy (R. 151, 152), which he exercised.

The restaurant opened on December 27, 1944, and lost money from its inception and until the partnership between Rose and Huse was dissolved (R. 397). On May 22, 1945 petitioner and Rose became partners in the restaurant. Petitioner advanced a total of $19,951 toward the enterprise, and was still paying on the $10,000 note at the time of trial (R. 415).

Since petitioner and Rose had no experience in the restaurant business (R. 383, 394, 396, 410), a man named Michael, who was formerly with the restaurant section of the OPA, was employed from December 17, 1944, to March 24, 1945, to run the restaurant, and to take care of the rationing (R. 122, 123, 143, 395, 396). The ration checks were all issued by Rose and Michael (R. 125-128, 143).

Petitioner knew nothing about rationing (R. 410, 412, 457, 458). The only connection he had with rationing was that after Michael left an assistant in petitioner's office checked the invoices for the restaurant and made a mechanical check of the ration points shown on such invoices (R. 422, 423).

The ration records were kept at the restaurant (R. 334, 335), and petitioner personally had nothing to do with the computation of points for the restaurant (R. 425).

In January, 1945, petitioner met Ralph W. Jacobs (a defendant in the case), who was a camp supervisor for the

Northern Pacific (R. 356, 357). Petitioner asked him to help him in the restaurant in view of his experience, and Jacobs did give petitioner a number of valuable suggestions (R. 357-358, 398) about running a restaurant.

Jacobs pleaded guilty to all charges before the trial, but had not been sentenced (R. 371).

Jacobs testified that petitioner asked him about buying meat and shipping it out, after telling Jacobs the restaurant was short on points. Jacobs also testified that he told petitioner that Jacobs could borrow some ration points from his North Dakota account, and the restaurant would have to pay them back in the future, and that petitioner agreed to pay the points back (R. 358-362). Jacobs said petitioner gave him $500 in cash for possible purchases (R. 359), but it was, in fact, a check (R. 399-400; Deft's Ex. A) which was charged to Huse's Restaurant (R. 399). While Jacobs was in Minneapolis he purchased 4 barrels of meat from the Crown Meat and Provision Company; later he purchased another 4 barrels from the same concern and directed both shipments to go to Huse's Restaurant (R. 359, 360). Jacobs gave the seller points belonging to Mandan Creamery Company of North Dakota (R. 359, 360). The points were insufficient to cover the merchandise, and Jacobs told the seller he would send him the points in the near future (R. 361). Huse's Restaurant never repaid the points because OPA seized the records (R. 362). When the

restaurant was sold it had 23,374 unused ration points on hand (R. 468).

The shipments of the 4 barrels each were made on February 6, 1945, and February 12, 1945 (R. 153, 154) from Minneapolis, Minnesota, from the Crown Meat and Provision Company to Huse's Restaurant in Spokane (R. 360).

There was a sharp conflict between Jacob's story and petitioner's testimony concerning the conversation relative to ration points. Petitioner testified there was no conversation about points (R. 401, 402) concerning the barrels, and that he did not know what, if any, points were required (R. 412, 413). It should be remembered that the only evidence against petitioner to show any wilful violation on points re the barrel shipments was Jacobs because there was no testimony of any kind that petitioner ever contacted or saw the sellers of the produce or any of their agents or even saw any of the barrels themselves or their contents.

The other transaction upon which the charges are based is a purchase of meat by Jacobs in Missoula, some forty quarters. The evidence of this transaction is very clear that Jacobs told petitioner that the meat he could purchase in Missoula was point free. Jacobs so testified (R. 363) twice in the government's case in chief. When interviewed by the OPA investigators, petitioner so stated in Jacobs'

presence (R. 331, 332), and it was not denied by Jacobs (R. 337, 412). Petitioner told Rose it was point free beef (R. 378, 379, 381, 382).

Petitioner also testified that Jacobs told him the meat was point free (R. 405, 413).

The government sought to show that petitioner was familiar with rationing by examining petitioner about his signature on Pl. Ex. 68 (R. 458-461), but it is apparent from the examination that petitioner knew nothing about rationing.

All storage charges for all the meat was paid by Huse's Restaurant even after the account at the Hazelwood Cold Storage Company was placed in petitioner's name for security purposes (R. 145, 154, 155, 179-186, 416, 417).

All withdrawals of meat from the Hazelwood storage by Rose was for use in Huse's Restaurant (R. 135, 154, 324-326). It is clear that all the meat withdrawn by Rose and Michael was for use in Huse's Restaurant, and the government never contended otherwise.

It is also clear from all the evidence that petitioner never at any time contacted any of the sellers, shippers or storers of the meat and never even saw it.

While there was much documentary and other evidence offered by the government, the facts above given are the essentials of the case.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the indictment and each of Counts 1, 6, 7, 8, 9, 11 and 12 of the information charged petitioner with offenses against the laws of the United States.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the trial court's definition of proof beyond a reasonable doubt was not error.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that there was no prejudice to petitioner by the trial court's failure to define the term "wilful" in its instructions to the jury.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the trial court adequately defined to the jury all the legal elements involved and the factual elements the jury must find to exist before the jury could apply the facts to the law and find petitioner guilty of the charges.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that there was sufficient evidence to sustain the conviction on Counts 14, 15 and 16.

6. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the jury was sufficiently instructed with reference to the proof required concerning the overt acts alleged in the indictment.

7. The Circuit Court of Appeals for the Ninth Circuit erred in holding that no substantial rights of petitioner were violated by the instruction of the court that Michael's knowledge of a violation of law could be imputed to petitioner.

8. The Circuit Court of Appeals for the Ninth Circuit erred in holding that petitioner was not prejudiced by the failure of the trial court to instruct the jury to disregard the argument of the United States Attorney that Jacobs plea of guilty to the conspiracy charge tended to prove the conspiracy between petitioner and Jacobs.

9. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the admission of plaintiff's exhibit 62 was not prejudicial to appellant.

10. The Circuit Court of Appeals for the Ninth Circuit erred in holding that petitioner suffered no substantial prejudice from the admission of Louis E. Michael's testimony impeaching petitioner's testimony.

11. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the assigned errors of the trial court were not so prejudicial as to deprive petitioner of a fair trial.

ARGUMENT

SUMMARY OF ARGUMENT

Briefly the argument is addressed to why the writ should be granted and the grounds, broadly speaking, are that petitioner was not granted a fair trial and that most of the errors are of a fundamental character going to the roots of our legal system and are of importance not only to petitioner but to the general administration of justice in that our historic judicial system of safeguards to defendants generally must be maintained. We think serious intrusions on those safeguards are represented in this case.

It should be noted that counsel representing petitioner here and on the appeal to the circuit court did not represent him at the trial.

Trial counsel interposed no demurrer to the indictment or information nor made any request for a bill of particulars. No challenge to the sufficiency of the government's evidence was interposed at the conclusion of the government's case in chief. No motion for directed verdict was made at the conclusion of the entire case. No requested instruction on wilful was offered by trial counsel although one was offered by the government (R. 24) and not given. Trial counsel did not except to the giving of the instructions involved or to the failure to give any of the instructions here in issue. Many of our assignment of errors to

the introduction of evidence and the argument of government counsel are not supported by exceptions.

In view of the almost complete lack of protection afforded petitioner in the trial we are relying upon the rule that this court will notice material error though that error was not challenged.

Rule 52(b), Federal Rules of Criminal Procedure

Fisher v. U. S. (decided by this court June 10, 1946, No. 122)

Screws v. U. S., 325 U. S. 91, 107.

We also rely upon the rule that a federal judge is not merely a moderator, but must assure a fair trial and protect the essential rights of the accused.

Quercia v. U. S., 289 U. S. 466.

Starr v. U. S., 153 U. S. 614.

Bollenbach v. U. S., 326 U. S. 607.

Kettenbach v. U. S., (CCA 9) 202 Fed. 377, 385.

POINT 1

THE CIRCUIT COURT ERRED IN HOLDING THAT THE INDICTMENT AND COUNTS 1, 6, 7, 8, 9, 11 and 12 CHARGED OFFENSES AGAINST THE LAWS OF THE UNITED STATES

The indictment is void because it fails to state where the conspiracy was formed. It alleges complete ignorance as to the place and does not even state that that it was formed in the United States. *Cf. Brown v. Elliott*, 225 U. S. 392.

The indictment is void because the offenses allegedly conspired to be committed involve the mutual co-operation of the persons charged, and the preliminary agreement between the parties to commit it is thus not an indictable conspiracy.

U. S. v. Katz, 271 U. S. 354.

Gebardi v. U. S., 287 U. S. 112.

This is particularly true since subdivision (i) of section 20.1 of Revised Ration Order No. 16 (9 F.R. 6765), reproduced in the appendix hereto, reads as follows:

> "No person shall offer, solicit, attempt *or agree* to do, or assist in doing any act in violation of this order." (Italics ours)

This regulation covers conspiracy by its own terms. The conspiracy thus charged is an agreement to agree to do acts in violation of unspecified sections of the Ration Order. To allow the indictment to stand is to countenance charging a conspiracy to commit a conspiracy which is not permissible.

U. S. v. Armstrong (DC Ind.) 265 Fed. 683, 695.

U. S. v. New York Cent. & H. R. R. Co. (CC) 146 Fed. 298, 303.

The primary vice of both the indictment and the counts of the information in question is that nowhere do these pleadings point out specific acts based on specific provi-

sions of the regulations. The only regulation pointed out is section 20.1. Reference to it compels one to read the entire Ration Order consisting of 54 large pages of three column fine print to try to find out what is prohibited.

It is plain that a mere reference to the very general provision of section 20.1 and the statutes involved (50 U.S.C.A. App. sec. 925(b) and sec. 633(5)), which also give no warning of the *specific* acts prohibited, does not remedy the vagueness and indefiniteness condemned by the supreme court cases referred to in *U. S. v. Crummer,* (C.C.A. 10) 151 F. (2) 958, 962; in *Foster v. U. S.* (C.C.A. 9) 253 Fed. 481, 483, and in *Boykin v. U. S.* (C.C.A. 5) 11 F. (2) 484, 485.

The rule that the charge must descend to particulars applies here with great force since both section 20.1 of the Revised Ration Order and the statutes are very general in their terms.

Compare Counts 14, 15 and 16 and sec. 1364.407(f) of Rev. M.P.R. No. 169 (9 F.R. 9617). There the regulation referred to specifically describes the required act. Not so with sec. 20.1 of Revised Ration Order 16. This comparison makes the point very clear.

POINT 2

THE CIRCUIT COURT ERRED IN HOLDING THAT THE TRIAL COURT'S DEFINITION OF PROOF BEYOND A REASONABLE DOUBT WAS NOT ERROR.

This instruction (R. 478) is so clearly erroneous as to

require but little discussion. *Lilienthal's Tobacco v. U. S.*, 97 U. S. 237, 266.

Much less objectionable instructions on the same subject have been condemned.

Pettine v. Territory of New Mexico (C.C.A. 8) 201 Fed. 489.

Owens v. U. S. (C.C.A. 9) 130 Fed. 279.

U. S. v. Woods (C.C.A. 2) 66 F. (2) 262.

The circuit court erred in failing to see that other portions of the instruction *do not deal with proof but merely define reasonable doubt*. It is the portion dealing with the *proof* we think obviously error. The distinction may be narrow, but it is vital.

The instruction manifestly deprives petitioner of his fundamental right to an acquittal if the government fails to prove the affirmative of the issues involved beyond a reasonable doubt and shifted the burden to petitioner to show that there was a doubt based on reason before he could be acquitted.

This type of instruction has never been passed on by this court to our knowledge.

We believe that it is so prejudicial to all future defendants as to warrant this court in expressing its views on the very vital point involved. The very broad approval

given it by the circuit court (R. 564-565) makes certain that lower courts will feel free to use such an instruction in the future. The rights of many defendants will depend on this court's action.

POINT 3

THE CIRCUIT COURT ERRED IN HOLDING THAT THERE WAS NO PREJUDICE TO PETITIONER BY THE TRIAL COURT'S FAILURE TO DEFINE THE TERM "WILFUL" IN ITS INSTRUCTIONS TO THE JURY.

Wilfulness is the root of all the offenses charged (50 U.S.C.A. App. sec. 925(b) and sec. 633(5)).

The statutes are general in their terms and do not define the specific acts prohibited. Section 20.1 of Revised Ration Order 16 is general and refers to the entire Order which must be searched to attempt to find what is prohibited.

Under these circumstances the court must clearly define the term. Equivocation and uncertainty will not do. The giving of a clear definition of what the term "wilful" means is the only safeguard any defendant has against being punished for purported offenses which are not defined by the statutes but which must depend upon the terms of regulations not in being when the statutes were enacted. The trial court *must* clearly define the term.

Screws v. U. S., 395 U. S. 91.

Bollenbach v. U. S., 326 U. S. 607.

Spurr v. U. S., 174 U. S. 728.

The circuit court erred in justifying the omission by referring to an instruction (R. 479) which did not define wilful *but only told how intent could be determined.* The distinction is clear—telling *how* intent is determinable is *not a definition of wilfulness.*

The government offered a definition (R. 24) but none was given.

The prejudice is obvious since the point of wilfulness was at all times contested by petitioner and is the crux of the entire case. We believe that such an essential term *must* be made crystal clear to jurors as well as the fact that whether the required intent was entertained is the pivotal issue—the difference between guilt and innocence.

POINT 4

THE CIRCUIT COURT ERRED IN HOLDING THAT THE TRIAL COURT ADEQUATELY DEFINED THE LEGAL ELEMENTS INVOLVED AND THE FACTUAL ELEMENTS THE JURY MUST FIND TO EXIST BEFORE THE JURY COULD APPLY THE FACTS TO THE LAW AND FIND PETITIONER GUILTY.

The court failed to mention the statutes involved and said that the *regulations* made transfers *unlawful,* without mentioning the essential ingredient of wilfulness (Cf. R. 486, 487, 488). This gave the impression that the mere doing of the acts was a crime, irrespective of wilfulness.

Likewise the court failed to instruct as to the effect of section 11.7 of Revised Ration Order 16 (9 F.R. 6756).

This regulation is printed in the appendix and has the effect of allowing rationed foods to be stored and returned from storage point free.

The evidence clearly shows that appellant was merely the managing director of Huse's Restaurant and an employee (R. 188, 190, Pl. Ex. 41). All meat was purchased and stored for use in the restaurant (R. 135, 154, 324-326) and withdrawn by Rose, one of the partners, and by Michael, a co-employee of petitioner, for use in the restaurant (R. 135, 154, 324-326). The government did not attempt to show or urge that petitioner *sold* any of the meat to the restaurant.

Yet Counts 6, 7, 8, 9, 14, 15 and 16 are drawn on the theory that the meat was owned by petitioner, stored for his own use and that withdrawals from storage by Rose and Michael for the use of the restaurant was a violation of the regulations in that points were not surrendered to petitioner by Rose and Michael and the statement required to be given by a seller was not given by petitioner to Rose.

Plainly the jury should have had an instruction on this regulation which dispenses with the need for points under these circumstances.

The bearing on Spokane Overt Acts 1, 2, 3 and 4 of the indictment is also clear since they are drawn on the same theory—unlawfulness of the withdrawals by Rose of the

meat from storage without the surrender of points to petitioner.

Neither did the court instruct as to the legal effect of section 11.8 of Revised Ration Order 16, (9 F.R. 6756) printed in the appendix. The regulation provides that no points need be given up for a transfer for security purposes only. The prosecution hit hard and often at petitioner's instructions to change the storage account from Huse's Restaurant to his own name for security reasons, inferring that it was wrong (R. 170, 416-418, 541-542) although the storage charges were at all times billed to and paid by Huse's Restaurant (R. 180, 184). The question of whether petitioner sought, by the transfer, to defraud creditors was wholly irrelevant to the issue and should have been checked by the trial judge. *Pierce v. U. S.* (C.C.A. 6) 86 F. (2) 949.

In view of these inferences the jury should have had the benefit of the provisions of this regulation.

Taken as a whole we believe the instructions are subject to the infirmities condemned in *Morris v. U. S.* (C.C.A. 9) 156 F. (2) 525 and *Corson v. U. S.* (C.C.A. 9) 147 F. (2) 437.

Where the jury does not have all the legal bases involved, it cannot discharge its historic function of applying the facts to the law to determine guilt or innocence and

the convictions are void because the essential legal standards were not considered.

POINT 5

THE CIRCUIT COURT ERRED IN SUSTAINING THE CONVICTIONS ON COUNTS 14, 15 and 16 OF THE INFORMATION.

These counts involve Rev. M.P.R. No. 169, section 1364.407(f) (9 F.R. 9617).

That regulation, which appears in the appendix, provides that the prescribed statement must be given by the *seller* to the *purchaser*.

Since there was no evidence that petitioner *sold* any meat to Rose, one of the partners for whom petitioner was working, or to the partnership of Rose and Huse, there was a complete failure of proof as to these counts.

In any event there is not a scintilla of proof that such statements, even if required, were not given by petitioner to Rose. The record is completely silent on these counts.

The circuit court erred in not reversing as to these counts.

POINT 6

THE CIRCUIT COURT ERRED IN FAILING TO INSTRUCT THAT THE PROSECUTION MUST PROVE THAT AT LEAST ONE OF THE OVERT ACTS CHARGED IN THE INDICTMENT AS BEING COMMITTED IN THE EASTERN DISTRICT OF WASHINGTON WAS COMMITTED AS ALLEGED.

The indictment is unusual in that it contains two separ-

ate categories of overt acts—one group charged as occurring in Eastern Washington and one group in Montana.

The failure of the court to point out that one of the Eastern Washington overt acts must be established as charged left the jury free to convict on overt acts occurring in Montana.

The court's instruction was that "some overt act" must be done (R. 483) and "that at least one or more overt acts as charged was committed by one or more of them" (R. 484). The instructions fail to cover the point of what overt acts must be established or the degree of proof necessary to establish such required overt act.

We believe the action is in conflict with *Nash v. U. S.*, 229 U. S. 373, 379, 380:

> "Thus while it may be admitted that not all of the means alleged need be proved, the charge invited the jury to consider all and permitted a verdict upon any one of them."

POINT 7

THE CIRCUIT COURT ERRED IN INSTRUCTING THAT THE KNOWLEDGE OF MICHAEL COULD BE IMPUTED TO PETITIONER

The instruction (R. 501) clearly allows Michael's knowledge of a violation of the law to be imputed to petitioner if the jury considered Michael an accomplice.

We take it as elementary that a basic element of the of-

fense cannot be imputed to petitioner where there is no evidentiary basis therefor.

Freeman v. U. S. (C.C.A. 3) 20 F. (2) 748.
Williams v. U. S. (C.C.A. 5) 55 F. (2) 226.
Wietz v. Potter (CC) 32 Fed. 888, 889.

The point is important because although Michael was informed by Jacobs that the Montana seller of the beef was holding out for points (R. 144) petitioner wasn't there when Jacobs told Michael that (R. 145). There is no evidence that Michael, or anyone else, ever communicated that information to petitioner.

The prejudicial character of the instruction is evident.

POINT 8

THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONER SUFFERED NO PREJUDICE BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO DISREGARD THE ARGUMENT OF THE UNITED STATES ATTORNEY THAT THE PLEA OF GUILTY BY JACOBS TO THE CONSPIRACY TENDED TO PROVE A CONSPIRACY BETWEEN JACOBS AND PETITIONER.

The argument (R. 523) is a bald statement that because Jacobs, who had good legal advice and counsel, had pleaded guilty to the conspiracy, that Jacobs testimony buttressed by such plea, overcame petitioner's testimony concerning the existence of the conspiracy.

It is elementary that no act or declaration of a co-conspirator can bind another co-conspirator after the con-

spiracy has ended. Arrest and arraignment certainly ends the conspiracy. Obviously a plea of guilty by Jacobs is not binding or admissible to prove petitioner's guilt as to the existence of the conspiracy.

Where the prosecutor hits below the belt it is the duty of the court to restrain him and to instruct the jury to disregard his remarks.

Berger v. U. S., 295 U. S. 78.
Viereck v. U. S., 318 U. S. 236, 248.
N. Y. Central Ry. Co. v. Johnson, 279 U. S. 310.
Volkmor v. U. S. (C.C.A. 6) 13 F. (2) 594.
Pierce v. U. S. (C.C.A. 6) 86 F. (2) 949.
Kettenbach v. U. S. (C.C.A. 9) 202 Fed. 377, 385.

The prejudicial character of the incident seems clear.

POINT 9

THE CIRCUIT COURT ERRED IN HOLDING THAT THE TRIAL COURT'S ADMISSION OF PLAINTIFF'S EXHIBIT 62 DID NOT PREJUDICE PETITIONER.

Exhibit 62 was prepared by the witness who testified concerning the whole matter. It was obviously prepared for trial purposes (R. 294-303). It was addressed to petitioner, although not made at petitioner's request and the witness did not see or know petitioner. It was an official certificate as to the grades of meat said to be involved, although clearly hearsay, and introduced to establish the character of the meat.

No impeachment was involved—no lack of memory of the witness was involved. The exhibit was offered and admitted as independent evidence of the things it purports to state. This is error of the most flagrant type.

Luse v. U. S. (C.C.A. 9) 49 F. (2) 241.

Garber v. New York City Ry. Co., 92 N.Y.S. 722.

The prejudice is obvious when the exhibit is examined in the light of its official character (R. 299).

POINT 10

THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONER SUFFERED NO PREJUDICE FROM THE ADMISSION OF THE IMPEACHING TESTIMONY OF LOUIS E. MICHAEL.

The question propounded to appellant (R. 436, 437) related to a time "a few days before the 1st of February, 1945."

The question purporting to impeach petitioner's testimony put to Michael fixed the time as "a few days before March 1st, 1945." an entirely different time by a month.

Since the time was materially different, the objection to the purported impeachment should have been sustained.

Gordon v. U. S. (C.C.A. DC) 289 Fed. 552.

Gordon v. Thomas (C.C.A. DC) 70 F. (2) 752.

The matter was important because this was the very last testimony offered in the entire case and the jury was

thus left with the strong impression that petitioner wilfully made a false statement under oath.

The prejudice is clear in the setting in which the incident occurred.

POINT 11

THE CIRCUIT COURT ERRED IN RULING THAT THERE WERE NO ERRORS IN THE CASE WHICH SUBSTANTIALLY PREJUDICED PETITIONER.

We believe that the errors here committed and assigned as error to the circuit court (R. 41) are so numerous and of such importance that, *at a minimum*, the case falls within the principle of *Egan v. U. S.* (C.C.A. DC) 287 Fed. 958, 971, that:

> "While there is perhaps no single instance involving error so prejudicial as to warrant a reversal, we are convinced that, considered as a whole, the rights of defendant were so prejudiced thereby as to deprive him of that fair and impartial trial which the constitution and the law of the land accords to every citizen accused of the commission of a crime."

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise of this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.



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